No. 4409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY (a corporation), THE FIRST NATIONAL BANK OF BOSTON (a National Banking Association), NATIONAL BANK OF COMMERCE IN NEW YORK (a National Banking Association), THE FIRST NATIONAL BANK IN ST. LOUIS (a National Banking Association), NATIONAL SHAWMUT BANK OF BOSTON (a National Banking Association), NATIONAL CITY BANK (a National Banking Association), and FIRST NATIONAL BANK OF CHICAGO (a National Banking Association),

Appellants,

vs.

UNION LAND & CATTLE COMPANY (a corporation), and W. T. SMITH, receiver of said Union Land & Cattle Company, under and by virtue of that certain order given and made by the above-entitled court in the above-entitled action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

BRIEF FOR APPELLEES.

J. W. DORSEY,
W. E. CASHMAN,
Royal Insurance Building, San Francisco,
In Propriis Personis and as Attorneys for Appellees.

S. W. BELFORD,
GEO. S. BROWN,
Nixon Building, Reno, Nevada,
Attorneys for All Appellees.

Subject Index

Table of Cases Cited

(Appellants' authorities italicized.)

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Appellees.

BRIEF FOR APPELLEES.

I.

PERISCOPIC STATEMENT OF FACTS AND OF EVENTS PREVIOUS TO AND SURROUNDING THE EMPLOYMENT OF J. W. DORSEY AND W. E. CASHMAN BY THE DEFENDANT COMPANY AND ITS RECEIVER.

This is an appeal from that part of an order of the District Court of the United States, for the District of Nevada, filed in said court on August 4, 1924, whereby the receiver was directed to pay to J. W. Dorsey and W. E. Cashman $2500 (Tr. p. 28) based upon their petition as attorneys for the Union Land & Cattle Company, filed herein on June 18, 1924, by which they sought reimbursement for moneys advanced and compensation for professional services rendered. The petition referred to is as follows:

> "Notice is hereby given, that on the 18th day of June, 1924, at the courtroom of the above-entitled court, in Carson City, Nevada, at the hour of ten (10) o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the undersigned will apply to said Court for an order authorizing the Receiver of Union Land & Cattle Company to repay to the undersigned the moneys by them advanced, laid out and expended for transportation, hotel charges and other expenses by them incurred in trips to and from said Carson City, and while there, and in and about and for the benefit of said Company, its creditors and all interested in the matter of said receivership, from May, 1923, to May, 1924, inclusive. And also for reasonable compensation for professional services as attorneys for said Cattle Company, and as special counsel for said Receiver and in the interest of said Cattle Company and of its creditors and others con-

cerned in the properties in the hands of said Receiver, and all in protecting the properties and estate of said Cattle Company in the hands of said Receiver from spoliation, waste, sacrifice and destruction.

"The moneys expended by the undersigned for the purposes aforesaid aggregate the sum of six hundred twenty and 57/100 dollars ($620.57).

"The fee which will be asked through the motion above mentioned for the professional services rendered by the undersigned during the period above limited will be the amount to be fixed by the Court as a reasonable compensation for the professional services referred to in and about the petitions, orders and appeals therefrom, heard and made in the above-entitled court, and for services performed in the several appeals taken from orders entered by the above-entitled court in said above enumerated matters.

"The said motion will be based upon this notice, the records and files in the above-entitled matters, oral and written evidence to be introduced at the hearing of said motion, and the information and knowledge possessed by said Court.

"Dated this 9th day of June, 1924.

(Sgd.) J. W. Dorsey and
(Sgd.) W. E. Cashman,
Attorneys for Defendant."

(Tr. pp. 4, 5.)

The circumstances in and following which these appellees were employed by the defendant cattle company and by the receiver are, in brief, these:

On July 28, 1920, W. T. Smith was appointed receiver for the property of the Union Land & Cattle Company at the suit of the First National Bank of San Francisco, an unsecured creditor. At the time

of the appointment the property of the cattle company consisted of about 226,000 acres of land in the states of Nevada and California; about 69 per cent of the capital stock of the Antelope Valley Land & Cattle Company; about 40,000 head of cattle; 40,000 head of sheep; 2500 head of horses; and ranch equipment. The indebtedness of the company consisted of a debt of $1,020,000, secured by deed of trust of the land of the company, and an assignment of the stock of the Antelope Valley Land & Cattle Company, and an unsecured indebtedness aggregating approximately $3,282,000. Of the latter, $400,000 was owing to the plaintiff in the receivership suit and $1,800,000 to the intervening banks.

This statement of facts is taken from the opinion of Judge Rudkin on one of the appeals herein, as reported in 297 Fed. at page 354.

The order appointing the receiver was prepared by the First National Bank of San Francisco, approved by all of the appellants here and was consented to by the defendant, Union Land & Cattle Company. It authorized the receiver to collect all of the assets of the company and to carry on its business

> " 'according to the usual course of business of like character, and to employ such employes, accountants, agents, assistants *and attorneys* as he may deem necessary and proper. 'The reasons for such an order were thus stated in the complaint:
>
> " 'That the assets of defendant if prudently operated and administered can be realized upon

over a period of time in amount sufficient to meet all of its liabilities and leave a considerable equity for the stockholders, but that the liabilities of the defendant already matured and those now about to mature cannot be met by the defendant at the present time, or as the same fall due, and defendant cannot at this time market its livestock to advantage and by reason of the present financial condition it is impossible for the defendant to get additional credit to refund its obligations due and about to become due, and the defendant is not able and will not be able to meet its obligations as they mature in the ordinary course of business.' " (Tr. pp. 9, 10.)

"This [as stated by the Honorable Judge of the lower court in its opinion upon which the order appealed from was based] was a clear and confidently expressed judgment that if the estate were prudently managed as a going business under a receivership, the liabilities could be paid and a considerable equity preserved for the stockholders." (Tr. p. 10.)

"Early in 1923 there was filed an agreement to which all or practically all creditors were parties, providing that the property in the hands of the receiver be returned to the defendant company to be managed for a number of years as a going concern by a creditors' committee consisting of attorneys and bank officials, with Warren Olney, a San Francisco lawyer, as president." (Tr. p. 10.)

"This document disclosed a belief on the part of the creditors as late as April, 1923, after three years under the receivership, that the assets of the company could not be liquidated immediately and at forced sale without loss of a large part of their value, and that the property should be liquidated over a considerable period of time, and in an orderly manner. This

cannot be construed otherwise than as a deliberately formed opinion that the business of the company should be continued during liquidation." (Tr. p. 10.)

"In May, after strenuous objection had been made to a proposed distribution of about $100,000 of defendant's funds among a number of attorneys acting for the creditors, this agreement was abandoned." (Tr. p. 11.)

"No demand for immediate liquidation had been made up to this time, but within a few weeks, and on the 18th day of May, 1923, the First Federal Trust Company filed a petition praying that it be permitted to foreclose the mortgage or trust deed executed in 1916 by the defendant company to secure the payment of $1,200,000 in bonds. Every installment of principal and interest on these bonds has, and at that time had been, paid promptly. The principal then due amounted to $840,000, or thereabouts. Foreclosure was demanded on the alleged ground that the appointment of a receiver constituted a violation of one of the express provisions of said trust deed." (Tr. p. 11.)

The particular provisions of the trust deed, upon which the banks rest their case, were:

"ARTICLE IV. Section 1. If any one or more of the following events, herein called, 'the events of default' shall happen, that is to say: * * *

"(d) An order, decree or judgment shall be made for the appointment of a receiver or receivers of the company, or of any substantial part of its property or the trust estate or any substantial part thereof." * * *

And such default should continue for the period provided by Section 1 of Article IV of the trust

deed, then the trustees should forthwith be entitled to sell at public auction to the highest and best bidder all the mortgaged and pledged properties described in the instrument.

The contention of the appellants here was that the foreclosure of the trust deed became necessary (Opinion, Tr. p. 11 et seq.)

> "because, by reason of the default created by the appointment of the receiver, the trustees named in the trust deed were powerless to release from the lien of the trust deed any mortgaged lands the receiver might sell.
>
> "This assumption, kept constantly in the foreground, seems to have been sufficient to render fruitless any attempt on the part of the receiver to sell property covered by the trust deed. Would-be purchasers in view of the uncertainties, naturally were afraid to invest. Holding the lands and disposing of the livestock, except in limited numbers, was considered as not only unwise, but highly imprudent, for several reasons: First, it would 'disrupt and disorganize the business of the Cattle Company'; second, large values would be lost if the lands were stripped of the livestock; third, under the express provisions of the trust deed, Article 3, Section 16, and Article 4, Section 1, it was provided if at any time the livestock was reduced in numbers below 25,000 cattle above one year of age, and 25,000 sheep on the lands of the company or under its control in the States of Nevada or California, that event would constitute a default entitling the trustees to take possession of the mortgaged property, and sell it on such terms as they might fix." (Opinion, Tr. pp. 11, 12.)
>
> "August 24th, 1923, the trustees named in the trust deed, on the ground that the appointment

of the receiver constituted a default, filed herein a petition asking that the mortgaged property be surrendered to them to be sold at public auction on such terms as they might fix. Within a short time thereafter eight petitions were presented by the bank creditors, approving the application of said trustees, and asserting that the trustees were 'entitled to *immediately* sell said property described in said trust deed in the exercise of the powers thereby granted.' The prayer of the bank petitioners was that all the property of the Union Land & Cattle Company, except such thereof as may be sold by said Trust Company, be sold *forthwith*. Such a program involved forced sales of everything belonging to the defendant company under conditions highly unfavorable. More than a year and a half prior to this date, January 13th, 1922, the then president of the Trust Company and of the First National Bank, wrote the receiver as follows:

" 'The committee have come to the conclusion that we might as well call the creditors' agreement off and to take immediate steps to secure control of the company's affairs or failing in that to petition the Court for an order to sell the properties.

" 'The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by actual purchase of the properties at foreclosure sale. I know there will be no change from this determination.' " (Opinion, Tr. pp. 12 and 13.)

"Every installment of interest and principal, amounting at the time to more than $400,000, had been paid out of funds on which the Trust

Company had no lien; its security seemed ample, and the alleged default consisted in the appointment of the receiver, made by the Court without any knowledge or warning that under the terms of the trust deed such an appointment could be followed by such serious consequences. Under the circumstances it was considered by the Court and the receiver that the claim of right to sell under the trust deed 'was unjust and inequitable, and that if sustained on appeal it would cause irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent'; furthermore, if the mortgaged property were sold at public auction by the trustees, as contemplated by the petitioners, the receiver, having no place to keep the stock, if any remained in his hands, would inevitably be forced to sell it. As a rule, at such sales prices received are small as compared with the value of the thing sold. Forced sales of all the mortgaged real property would therefore have been a calamity to every creditor not able to buy, or participate in buying, the property." (Opinion, Tr. p. 13 and 14.)

II.

EMPLOYMENT OF J. W. DORSEY AND W. E. CASHMAN BY THE DEFENDANT, UNION LAND & CATTLE COMPANY.

(a) As to Employment in Behalf of Union Land & Cattle Company.

Testimony of W. T. Smith.

Mr. Smith testified: The circumstances under which I employed Mr. Dorsey were as follows: When the litigation first commenced here in regard to the Union—meaning the petitions in interven-

tion—I told Judge Farrington and I also told Brown & Belford— (the attorneys for the receiver) that I thought the Union Land & Cattle Company as a corporation should be represented, and said to Mr. Dorsey and Mr. Cashman, the Union has no money; it has no way to raise any money; I don't know as you will ever be paid for the work you are doing now, but if it has to be done, some of us will have to go down in our pockets and dig it up. (Tr. p. 82.)

I am a stockholder of the Union Land & Cattle Company and it was first determined by me that the Union should be represented at the initiation of the entire proceeding. It was in the spring of last year (1923). I was in San Francisco and I told Mr. Dorsey, after consultation with Judge Farrington and with Brown & Belford, that I thought the Union Land & Cattle Company as a corporation should be represented in these proceedings, and then I talked to Mr. Dorsey and Mr. Cashman about it. It was not my understanding that in the spring of 1923 Messrs. Dorsey and Cashman were representing me as receiver, not until the filing of the petitions for liquidation. (Tr. p. 83.) Then, for the first time, I went in my capacity as receiver to employ Mr. Dorsey and Mr. Cashman. I didn't say when I approached Dorsey and Cashman last spring with reference to an employment of them by the Union Land & Cattle Company, that I did so as receiver. I only told them I thought somebody should be employed to

represent the corporation. I was receiver at that time and I suggested that to them at that time, but not as receiver. (Tr. p. 84.) It was not my understanding that by my action taken in the spring of 1923, I in any way committed the receivership to the payment of any disbursements on account of any services they might render from that time on.

What prompted me to reach the conclusion that the Union should be represented by Mr. Dorsey and Mr. Cashman was because the Union Land & Cattle Company was a corporation, it was not extinct and as long as proceedings in court were going on which might affect the stockholders of the Union Land & Cattle Company, I thought somebody should represent the corporation.

I can only say that my action in the spring of 1923 was taken as an individual, trying to see my way clear to do my duty to the Union Land & Cattle Company, for which I was receiver. (Tr. p. 85.)

> "Mr. Dorsey. Q. Mr. Smith, I understood you to say a moment ago that you would regard yourself as responsible for the fee for services performed for the Union Land & Cattle Company under the employment of about May, 1923?
>
> A. I don't remember the date, Mr. Dorsey.
>
> Q. You state you regarded yourself as responsible?
>
> A. Yes.
>
> Q. Do you remember that I told you I would not hold you responsible?
>
> A. I think I do." (Tr. pp. 88, 89.)

Shortly after the interview referred to by Mr. Smith, Messrs. Dorsey and Cashman were formally employed by W. H. Moffat, as the president of the Union Land & Cattle Company, to represent it as its attorney, in the further proceedings in the case.

The eight banks, whose names appear on pages 2 and 3 of the transcript, of whom seven are the appellants here, introduced themselves into these proceedings by intervention petitions. They have been represented by different firms of attorneys. In the initial steps taken on May 18, 1923, to become active in the receivership, McCutchen, Olney, Mannon & Greene, a firm in San Francisco, comprising eighteen lawyers, appeared for The First National Bank and the First Federal Trust Company.

On August 25, 1923, Jones & Dall, Esqs. appeared as attorneys for the First Federal Trust Company in its petition for leave to intervene. Messrs. Hoyt, Norcross, Thatcher, Woodburn & Henley appeared representing the banks whose petitions for leave to intervene are enumerated on pages 1 to 3 inclusive of the transcript.

The twenty-five gentlemen named (whose services were at the command of the banks) comprise the array of counsel and answer the reference of Judge Farrington in his opinion. (Tr. p. 15.) The banks they represent are mere volunteers; they were not necessary parties to the suit. It might

have run its course and ended in a final distribution without the presence of any of them; each bank was allowed to intervene because it had its own individual and personal interest in the assets in the hands of the receiver, and solely that it might represent and protect that personal interest in the further proceedings.

They represented nobody but themselves, and owed no duty to anyone else.

The great mass of creditors did not intervene, and were content to allow their interests to be represented and protected by the receiver, and his counsel, under the control of the court. The banks did not appear to stand in the attitude of interested observers only; they came in to fight anybody who contested their right to wreck the company; to challenge the right of the court to control, and of the receiver to possess, about $3,000,000 worth of property mortgaged to the First Federal Trust Company to secure an original debt of $1,020,000, which then amounted to $780,000, and is now reduced to $679,014.18. If they had succeeded in wresting this property from the receiver and turning it over to the Trust Company, or failing in this, had compelled the receiver to sell it forthwith, it cannot be doubted that to satisfy this debt, more than $2,000,000 worth of assets would have been lost to the creditors.

The arrogant attitude and constant interference of the banks whose petitions and appeals have ham-

pered and retarded the administration of this estate, depreciated the values of its properties and almost paralyzed the efforts of the lower court and its receiver to effect a sane and speedy liquidation, and their ruthless determination to either seize the estate they had committed to the control of the Federal court, and sacrifice its values at foreclosure sale under the trust deed, or to control its management to meet their own ends,—are clearly disclosed by the letter of R. Spreckels, the then president of the First Federal Trust Company and of the First National Bank of San Francisco, and the then chief executive officer of the creditors' committee composed of representatives of the appellant banks here. This letter, written January 13, 1922, to the receiver, is in part, as we have seen, set out in Judge Farrington's opinion (Tr. p. 13) and is found in full on pages 80 and 81 of the transcript, and (omitting immaterial matters) may be emphasized by repetition:

> "Rudolph Spreckels,
> First National Bank Building,
> San Francisco.
>
> January 13, 1922.
>
> "The Creditors' Committee will have a representative here in a few days with full power to act and to cooperate with me. The Committee have come to the conclusion that we might as well call the creditors' agreement off and take immediate steps to secure control of the company's affairs or failing that to petition the court for an order to sell the properties. (The petitions referred to were subsequently

filed by the banks, were 11 in number and are referred to on pages 1-3 of the transcript.)

"The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by *actual purchase of the properties at foreclosure sale.* (Italics ours.) I know there will be no change from this determination and I would very much prefer to see matters arranged by agreement than to have the situation aired in court. * * *

Yours very truly,

R. Spreckels."

This letter failed in its purpose.

Mr. Smith is not the type of man to yield to the intimidation of individual wealth, or to be awed by the effrontery of corporate power.

Later, in 1923, these disappointed and malevolent banks, sought by another "Creditors' Agreement" to get control of the defendant company and its properties, but the attempt failed and the effort was abandoned for the reasons stated in the court's opinion. (Tr. pp. 10, 11.)

The temper and purpose of the appellant banks may be inferred from the statement of Mr. Greene, one of their attorneys, made immediately after the failure of the creditors' agreement just referred to, to the effect that if their plan to take over the management of the cattle company and its assets

had to fail, the creditors would get no more than between 25 and 50 cents on the dollar. (Tr. pp. 95, 96.)

Shortly after this remark of Mr. Greene, and to accomplish the purpose of the banks to sacrifice the properties of the cattle company at auction block sales, there were the petitions heretofore referred to directing the receiver to surrender the mortgaged property to the trustee for forthwith sale.

(b) Employment of J. W. Dorsey and W. E. Cashman as Attorneys for the Receiver.

Testimony of W. T. Smith, Receiver.

It was not my understanding that in the spring of last year (1923) Messrs. Dorsey and Cashman were representing me as receiver—not until the filing of the petitions for liquidation. (Petitions in Intervention.) Then for the first time I went and employed Messrs. Dorsey and Cashman to act for the Union Land & Cattle Company in my capacity as receiver. (Tr. p. 84.) * * * When I consulted Messrs. Dorsey and Cashman in 1924 it was after proceedings were commenced for the foreclosure of the mortgage and the application of the banks for the sale of the property, whatever time that was. I cannot tell you whether I had occasion to talk with Messrs. Dorsey and Cashman, it was about August, 1923, with reference to employment—I don't remember that. Assuming that the petitions of the banks were filed in August, 1923. I consulted with Messrs. Dorsey and Cashman with

reference to their representation of me as receiver, after those suits were commenced. (Tr. p. 85.) I should say it was immediately after. The nature of my consultation with them at that time was that I had talked with Judge Farrington and had advised that additional counsel be employed to represent the receiver in proceedings before the appellate court. I did not understand that my conference at that time amounted to an employment of Messrs. Dorsey and Cashman—not in the beginning, but afterwards I had authority to do it, then they were employed. * * * I think they only represented me as receiver until the case was decided in the appellate court. I talked to the Judge about the employment and I think Brown & Belford knew about it. * * * Messrs. Dorsey and Cashman were employed to appear for the receiver in the proceedings before the appellate court—before the Circuit Court of Appeals. Messrs. Dorsey and Cashman were not employed by me until the suits were brought and appeal taken to the appellate court—the United States Circuit Court of Appeals. (Tr. p. 86.)

Supplementing this testimony, we quote from Judge Farrington's opinion:

> "Petitions for orders directing the receiver to surrender the mortgaged property to the trustees, and to sell the remaining property forthwith, were denied, and appeals were speedily taken. The issues were of such vital importance that it was deemed expedient and necessary to employ additional counsel to assist Messrs.

Brown & Belford in the presentation of the receiver's cases in the Circuit Court of Appeals. Accordingly, the receiver was directed to retain Messrs. Dorsey and Cashman. They were familiar with all the evidence and the issues involved; they were also heartily in accord, not only with the theory that the Trust Company had waived the alleged default, notwithstanding the provisions against waiver in the trust deed, but that the receivership could not be a default within the meaning of the trust deed, if, when the receiver was appointed, the Court was not informed that under the trust deed such an order of appointment would constitute a default entitling the trustees to immediate possession of all the mortgaged property, with the right to sell it on such terms as they might fix." (Tr. pp. 14, 15.)

(c) Order Authorizing Receiver to Employ Additional Counsel.

The following is the order made by Judge Farrington upon this subject:

> "The receiver herein is authorized to employ such additional legal assistance as he may think necessary, connected with the three appeal cases, to wit, No. 4194, No. 4195 and No. 4196, pending in the United States Circuit Court of Appeals, for the Ninth Circuit, in which he as receiver is now interested as the appellee.
>
> Dated March 17th, 1924.
>
> E. S. FARRINGTON,
> District Judge."
>
> (Tr. p. 61.)

(d) Order Appointing Additional Counsel.

After the receiver was authorized to employ additional counsel, the court made a direct order upon the subject, in part as follows:

"J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals of the United States, for the Ninth Circuit, with full authority to represent the receiver therein, to wit: (Here follows the title of each of the appeals referred to.)

Dated this 26th day of March, 1924.

E. S. FARRINGTON,
District Judge."

(Tr. pp. 62, 64.)

(e) As to the Character and Value of the Services Rendered by J. W. Dorsey and W. E. Cashman Under Their Employment by the Union Land & Cattle Company and by Its Receiver.

At the hearing of the application of Messrs. Dorsey and Cashman for reimbursement and compensation, W. E. Cashman testified:

Testimony of W. E. Cashman, for Applicants.

"The WITNESS (on direct examination by Mr. Dorsey): J. W. Dorsey and W. E. Cashman were employed by the Union Land and Cattle Company to represent it in this receivership matter, in the case of the First National Bank of San Francisco v. Union Land and Cattle Company some time in May 1923. They performed services in the matter of the application of the First Federal Trust Company to sue the receiver which was filed in May of 1923. That matter occupied, I think, three different trial days in this court besides the preparation previous to the first hearing, and the preparations of necessity in between the several hearings and I think it terminated on the 9th day of July, 1923. The next matter was the application of the First Federal Trust Company for

an order of this Court directing the receiver to return the properties that were covered by the trust deed to the trustees named in the trust deed for the purpose of sale. That was filed some time in August, 1923. Then following that was an application made by the complainant in the action for an order for speedy liquidation. Following that an application was made by seven eastern banks for the same purpose. Those matters came on for hearing finally in October, and I think were submitted some time during that month. Then there was an application made by the receiver for leave to purchase livestock which was filed some time in October and heard in October and determined some time in November. Following that appeals were taken by the First Federal Trust Company, The First National Bank, and what I term the eastern banks, from the orders of the Court made denying the relief prayed for in their various petitions. Now, I have taken from my notes the days and dates, and some of the work that was done beginning with May 28, 1923, and carried down to and including April 8, 1924, which was the day following the date of the decision of the Circuit Court of Appeals. These services were all performed between May 28, 1923, down to and including April 8, 1924. They included the examination of authorities, witnesses, various trial dates in this court, preparation of statements of evidence to be used on appeal, preparation of transcripts, the examination of authorities on the appeals, and the preparation of the briefs that were finally filed in the Circuit Court of Appeals, and the preparation for argument in that court; and practically from May 28th to July 9th, practically every day of that time was consumed in work in connection with the trial of the first case, not only with me but with yourself; we were in constant consultation and con-

stantly at work upon the question involved in those various proceedings. It necessitated thirteen trips from San Francisco to Carson City and return. Up to the present time I paid the expenses of those trips, or advanced the money for them. The correct amount of moneys so advanced is $620.57. That was the actual outlay in carfare and hotel bills and a large part of that time we were entertained at private houses. During all of the time we had opposition in these matters, other attorneys opposing or contesting the petitions—all of the time these were strenuously contested. The first application was made by the First Federal Trust Company, McCutchen, Olney, Mannon & Greene representing petitioner at that time. On the second application that was made by the First Federal Trust Company, it was represented by Messrs. Jones & Dall. The applications of the various unsecured creditor banks were represented by McCutchen, Olney, Mannon & Greene's office, by Mr. Greene, by Judge Olney and Mr. Mannon, and Mr. Thomas was here, I believe, and Mr. Cassell. The firm of McCutchen, Olney, Greene et al. were present and litigated for one or others of the creditors in all of these applications at all of the hearings. Mr. Jones from the time that he became the attorney for the First Federal Trust Company, continued to serve it as its attorney, until the judgment or decree of the Circuit Court of Appeals. There were several attorneys of the firm of McCutchen, Olney, Mannon & Greene here at all times—at least two lawyers, and I am not sure but that on one or two occasions there were three. I may be mistaken about that. The office of Hoyt, Norcross, Woodburn & Henley was also present at all of these hearings and were present for the contesting banks."

(Tr. pp. 31, 34.)

"In all the proceedings to which Mr. Cashman has referred, including those referred to in connection with my employment by the receiver, I was acting exclusively for the Union Land and Cattle Company, from the beginning of the proceedings initiated by the filing of the petition to sue the receiver until, and only until we went, just before we went into the hearing of the case on appeal. I represented, I think, all the creditors in all things that I have done since I was first employed by the Union Land and Cattle Company, not only the particular creditors mentioned by us, and our own creditors, but your clients. I thought I knew I represented the First National Bank of Chicago, and I think I know I did. I think the attempt here was to destroy this institution, to sell this institution and I thought and still think that those proceedings would have resulted, if successful on your part, in destroying the value of the property, impoverish my clients, and hurt, I mean lessen the moneys that your clients would receive. I thought the course that I was taking was for the advantage of the creditors, and all of the creditors of the Union Land and Cattle Company. I was representing the company which owed these obligations to the creditors, and I acted in behalf of all the creditors, if that is what you mean. I was really employed by and acted for the company, and in the interest of the creditors, and that is the only interest I have." (Tr. pp. 38, 39.)

Answering a question by Mr. Greene:

"Mr. Dorsey. I don't think I said we don't expect to get money out of the hands of the receiver. I certainly expect in the protection of the property for the benefit of creditors to be paid, as a laborer would be paid, or a man

who saved your house from destruction, or saved your property from ruin; it is rendering a service in the interest of creditors." (Tr. p. 40.)

Testimony of M. R. Jones, Opposing Counsel and Attorney for the First Federal Trust Company, Called by Applicants.

(On direct examination by Mr. Dorsey):

"I have represented the First Federal Trust Company and Milton R. Clark, Trustees, from the time a petition for leave to intervene and sell the properties in the possession of the receiver was filed in this court and case on August 25, 1923. I have been present in a number of those hearings when these petitions were heard and I took part in the matters relating to the appeal. I prepared a brief myself and read the brief prepared by Mr. Cashman and Mr. Dorsey. In the preparation, or in the agreements which resulted in the transcript as filed, we had a number of interviews. I know generally the character of services that were performed in reference to the First Federal Trust Company matters and such matters as I saw in this court when I was here. I know generally what was done by myself and I saw and know generally what was done by other counsel so far as it related to the deed of trust. As to the other matters there were hearings here, I think, running over a week or two weeks following my petition and I was not present.

Q. Omitting those and considering that the work was done that you know something of, that you were a part of, what in your judgment is a reasonable compensation for those services?" (Tr. pp. 41, 42.)

* * * * * * *

"A. From the work that I think was done, I think that work ought to be fairly worth

somewhere between three and five thousand dollars." (Tr. p. 45.)

Testimony of A. Crawford Greene, Opposing Counsel and Attorney for the Petitioning Banks, Called by Applicants.

(Direct Examination by Mr. Dorsey):

"I am familiar with all the proceedings on these various petitions, the trials of them and appeals from them, the work that was done generally in the case by my firm, by Hoyt, Norcross, Thatcher, Woodburn & Henley, by Jones & Dall, and by Cashman and Dorsey; I have a general view of the situation as a lawyer.

Q. Mr. Greene, what would you charge your client for those services that were performed on behalf of the Union Land and Cattle Company, assuming that we did no work for any other person or corporation?" (Tr. p. 46.)

* * * * * * *

"WITNESS. I have been asked as I understand the question to fix, or to suggest a fee for particular services; my only experience with those with whom I have been associated, is that a fee must largely be determined by the success of the service rendered; its advisability and propriety; and in fixing a fee, I cannot fix it without reference to those facts. I was going to proceed to say to Colonel Dorsey, if he would give me a list of the dates on which a complete day's service had been given to his client, it becomes a very simple matter, from my basis of computation as to what he should receive as a per diem remuneration; but I don't think the service has resulted in a success which warrants much more than that from his point of view.

Mr. DORSEY. Q. Supposing it occupied throughout the time we have been employed, four months?

A. Well, that would depend very largely on what your basis of compensation is; on a per diem basis, that varies all the way, as you know, from fifty to five hundred dollars a day; and your past experience would be a better indication to you as to what you should receive for your services than any guess I could make as to what your services were worth.

Q. Do you care to say what those services were worth, in your judgment?

A. Services to the Union Land & Cattle Company?

Q. Yes.

A. Give me the length of time that has gone in on it.

Q. Exceeding four months constant time.

A. Well, I should think four months of your time, Colonel, ought to be worth the figures that Mr. Jones gave."

(Mr. Jones figures were from three to five thousand dollars.) (Tr. pp. 48, 49.)

Testimony of Samuel W. Belford, for Applicants.

"The WITNESS (On Direct Examination by Mr. Dorsey). I have been familiar with the affairs of the receivership since the appointment of Mr. Smith. I think that I have been in court each time that Mr. Dorsey has been in court since these controversies arose, beginning in May, 1923. I know what services were performed by Mr. Cashman and what services were performed by Mr. Dorsey.

Q. What, in your judgment, is the value of those services?

* * * * * * * *

A. I would say, Colonel, from what I know of that controversy, that your services ought to be worth at least ten thousand dollars, and possibly more. If they had been rendered for

me as a private client, and I had the money to pay for them, I would pay more than that." (Tr. p. 65.)

In the controversy following the testimony of Messrs. Cashman, Dorsey, Jones, Greene and Belford, Mr. Dorsey said:

"I think all I have to say is that I realize the need for economical administration of the affairs of this receivership; I know every dollar that is spent is a dollar taken from the creditors. I think that every man who labors for the benefit of the receivership should receive some reasonable compensation, but it should not be excessive; it should be borne in mind always that this company is poor, that it is not able to pay all of its debts, and I think everybody should be content to receive a bit less than he would ask if he was working for a wealthy client. I say that particularly in view of the fact that we have applied for compensation; and I would like the Court to understand that all we ask for, and whatever conclusion the Court should come to, if it should think we are entitled to anything in any capacity, all we ask for is a very reasonable or very moderate compensation considering the services we have rendered. I say that for one reason because of what was said here at the time the effort to return the properties to the company failed. I know that it came before this court, and went out before the people interested, that the people who were to take over the management, who elected themselves, or had themselves elected officers of the corporation, saddled at once upon the company a very large sum of money, in the aggregate something like $100,000 or more. I know that some of those fees were large, and

were fees asked for services rendered solely and wholly for creditors, and not for the company; solely and wholly to put the company in the hands of the men who sought to control it and not in the interests of the company, I believe. I know that Mr. Moffat, who was president of the company, objected to the allowance, or the consideration of allowing any such sums of money that were demanded; and I know that he has had in mind always that whatever is done here should be done at the least overhead, the least possible expense, and all in the interest of the company, of this receivership. And feeling as I do toward Mr. Moffat, and knowing the condition of this company, I ask the Court, if it gives us anything at all, to consider that view. All we ask and all we want is a very moderate compensation for services.

Mr. GREENE. Are you now asking for compensation for services rendered to the receivership or not?

Mr. DORSEY. I have presented my views on that.

Mr. GREENE. You filed a petition first asking for compensation; you then asked to have that part stricken, and I understand now you are asking for it. I want to get clear whether you are or are not asking.

Mr. DORSEY. I am asking the Court to allow us for services performed. Upon what ground he makes that allowance is for the Court to determine. I am confident any service rendered for properties in the hands of a receiver, that tends for the benefit of those properties, and for the benefit of the creditors, is entitled to compensation. That is my view, and I think I would be entitled to ask for fees as attorney for the company, and that I would be entitled to ask for fees if I, a creditor of this company, should come in without being asked, and should

force my way into the litigation, and it should result in saving to the creditors large sums of money, or benefit the estate, and would be entitled to have back my expenses, and a reasonable compensation.

Mr. GREENE. Am I correct in understanding that you do not urge the allowance to yourself as counsel for the receiver?

Mr. DORSEY. You are not correct in anything you have said concerning that subject. I am asking for compensation for services performed. The services I performed primarily for the company; if I did anything in aid of the receiver, it was because the receiver and I were in accord with this phase of the matter. Both of us wanted to conserve these assets; both thought these properties would be taken away, and would be utterly destroyed; we were working together; whatever he said to me was for the benefit of this company; whatever I said to him was for the benefit of the receivership; what we discussed, my aim and his, was to benefit the creditors; and I said to you yesterday, your creditors as well as mine.

Mr. GREENE. Am I to understand that the request or motion you made eliminating from your petition any request for compensation to you on account of services to the receiver, stands as an elimination, or that you desire it restored?

The COURT. I want to say now I am responsible for the appointment of Mr. Dorsey, and I feel that he rendered very valuable service, and my intention is to make an order compensating him for his services. Of course if he refuses to take the money that is his affair; but he has rendered the service at the request of the receiver and at my request, and we are in duty bound to remunerate him. That is the way I look at it, and I feel he has rendered valuable service. Of course, if he and his asso-

ciate refuse to take the money, I have no way of compelling them to take it if they don't want it." (Tr. pp. 75, 76, 77, 78.)

In his opinion concerning the employment of Messrs. Dorsey and Cashman, Judge Farrington said:

> "The services performed by them were not only exceedingly valuable, but they are deserving of much larger compensation than the $2500 which I here allow. To argue that their assistance was unnecessary and the employment unwise, might perhaps be regarded as depreciating the ability and legal skill of the array of eminent and confident counsel opposed to the four attorneys representing the receiver." (Tr. p. 15.)

III.

THE COURT MAY PROPERLY ALLOW, AND WHEN APPOINTED BY HIM OR BY HIS AUTHORITY, SHOULD ALLOW, COUNSEL FEES AND EXPENSES INCURRED IN PROTECTING AND PRESERVING OR INCREASING THE FUND UNDER ITS CONTROL.

Petersburg Sav. & Ins. Co. v. Dellatorre, 70 Fed. 645;

Stuart v. Boulware, 133 U. S. 78; 33 L. Ed. 568;

Woodruff v. New York L. E. & W. R. Co., 29 N. E. 251;

Attorney General v. North American Life Ins Co., 91 N. Y. 57, 64-5;

Woodruff v. New York L. E. & W. R. Co., 10 N. Y. Supp. 305;

Trustees v. Greenough, 15 Otto 527; 26 L. Ed. 1157;
Burden Central Sugar Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810;
Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850;
Lamar v. Hall & Wimberly, 129 Fed. 79;
2 *Foster's Fed. Prac.,* Sec. 421;
Code of Civil Procedure, Sec. 796.

It was not until the petition for leave to sue the receiver was filed herein in May, 1923, by the First Federal Trust Company and Milton R. Clark, trustees, that the Union Land & Cattle Company employed J. W. Dorsey and W. E. Cashman to represent it and its creditors by preventing the petitioners from foreclosing the security held by them, or from interfering with the company's assets in the hands of the court through its receiver.

Prior to that time during the receivership the company and its stockholders were without legal representation.

Subsequently, on August 25, 1923, the First Federal Trust Company and Milton R. Clark, as trustees under the trust deed, filed their petition for leave to intervene and to sell properties in the hands of the receiver; on the same day the First National Bank of San Francisco filed its petition for an order directing liquidation and sale of properties, and on August 31, 1923, the seven eastern banks appearing here filed their several petitions

for leave to intervene and for an order directing liquidation and sale of properties. (Tr. pp. 1-3.)

These petitions in intervention were to the end that a default under the terms of the trust deed should be declared and the properties covered by this security turned over to the trustees, or failing in this, that all the properties of the Cattle Company in the hands of the receiver should be forthwith sold.

These petitions were denied and appeals were taken to the United States Circuit Court of Appeals. It was after this, and when the appeals were pending in the latter court, and when briefs must be prepared, and when it was thought necessary by the receiver and by the lower court that additional counsel for the receiver, who were, and because they were, familiar with the history of the case—located in San Francisco where the appeals were to be heard —should be employed.

It was, of course, known that J. W. Dorsey and W. E. Cashman believed the receiver had discharged the duties of his office in direct accordance with the order of his appointment with unswerving devotion to every interest involved—the creditors, secured and unsecured, the cattle company, its stockholders, and to the court controlling the administration of the estate, also that these attorneys were in hearty sympathy with and full concurrence in the legal conclusions announced and the views expressed by the court in its opinion and order in

appeal herein No. 4194, so forcibly characterized by Judge Rudkin in *First Federal Trust Company v. First National Bank of San Francisco,* 297 Fed., on page 356, as follows:

> "The trustees are seeking to disrupt and disorganize the business of the company, thereby causing irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent. That such a claim is inequitable and unjust does not in our opinion admit of doubt or question."

The appellate court affirmed the order of the trial court that there was no default and in denying the right of the trustees to sell under the deed of trust.

In these circumstances, are the attorneys employed entitled to compensation for their services?

When the petitions in intervention were filed there was a threatened, apparent, and immediate danger of waste and loss of the whole estate in the hands of the receiver. These properties were rescued and restored to the purposes of the trust.

The sole purpose of the employment of counsel was to prevent *forthwith* and calamitous sales and to keep the estate under the administration of the court for orderly and speedy liquidation.

Obviously, all of the creditors, including the appellants and excepting only the First Federal Trust Company, which would have confiscated $3,000,000 worth of property to satisfy a then debt of $780,000.

These attorneys were in all employments by the cattle company, by the receiver, and by the court,

charged with a duty to protect the general interest —to guard the estate in *gremio legis* for equitable distribution by its chancellor. They did not come in representing their personal rights; they were authorized to speak for the creditors, for the receiver, and for the preservation and protection of the properties in his hands, and for the common benefit to prevent spoliative attempts to wreck the receivership.

In the case of *Petersburg Sav. & Ins. Co. v. Dellatorre,* 70 Fed. at page 645, it is said:

> "It is a general principle that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred in proper proceedings taken for the purpose. That expense necessarily includes reasonable counsel fees. The counsel not only represents the complainant, who employs him to represent his interest in the suit, but he incidentally represents all others having a common and like interest in the suit and in the fund brought by it into court, and who avail themselves of his services and share in the benefits. It is but equitable and just that he should be compensated by all parties thus interested and that he should have a lien on the fund for his compensation to the extent of their interest in it."

In holding that counsel fees are proper allowances to a receiver for counsel employed by him in the discharge of his duties, the Supreme Court of the United States, in *Stuart v. Boulware,* 133 U. S. 78, 33 L. Ed. 568, on page 570 said:

> "Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and *the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have,'* as was remarked by Mr. Justice Bradley in Trustee v. Greenough, 105 U. S. 527, 537 [26 L. Ed. 1157, 1162], where the subject is considered."

In *Woodruff v. New York L. E. & W. R. Co.* (on appeal), 29 N. E. 251, the court said:

> "It is a cardinal principle in the disposition of trust estates that the trust fund shall bear the expenses of its administration, and that one who successfully conducts a litigation in *autre droit* for the benefit of a fund shall be protected in the distribution of such fund for the expenses necessarily incurred by him in the performance of his duty. * * * This right is extended, not only to necessary traveling expenses, but to all reasonable fees paid for legal advice in the discharge of his duties, and in most of the states includes compensation for time, labor and trouble."

It may fairly be said that Messrs. Dorsey and Cashman, aiding Brown & Belford as attorneys for the receiver, and representing the cattle company, preserved and kept the court and receiver in the control and possession of the huge properties mortgaged to the trust company.

In *Attorney General v. North American Life Ins. Co.,* 91 N. Y. 57, 64-5, it is held that the principle upon which counsel fees are granted where suits are brought or defended by persons acting *en autre*

droit (as representing others) stands upon the same ground as other necessary expenses of the preservation of the fund.

> "In an action or special proceedings for the administration of a fund *in the hands of the court* where a judicial apportionment or determination of rights is necessary for this purpose, the costs, *counsel fees,* and expenses of all necessary parties are *a lien and charge upon the fund.*"

In *Woodruff v. New York L. E. & W. R. Co.,* 10 N. Y. Supp. 305, the court says at 309-10 (referring to *Attorney General v. Insurance Company,* ante):

> "But the opinion expressly recognizes the rule that the court in its control of a fund is bound to recognize every substantial equity and every existing right in providing for the distribution of the fund. Equity was denied existence on that application (still referring to the case cited) as the petitioners had brought no fund into court, were not parties to the original action, and had simply intervened to protect personal rights. The present application presents different features. Plaintiff was the prosecutor in the original action and in the last. The settlement of the issues have adjudged that the party in occupation of the property—the primary security—must pay for such use and occupation, not only for the interest due, but the bonds as well. Plaintiff comes into court bringing a fund, the result of his exertions, and in this fund he has no personal interest, except to distribute it as trustee. This seems, therefore to be a case where equity and justice press for recognition, and is within the spirit of that decision."

Although neither the attorney nor the receiver brought a fund into court in this case, a precisely analogous thing was accomplished; they prevented property from being taken from the claimant who would probably have exhausted the mortgaged properties, valued at $3,000,000, to satisfy its then debt of $780,000—now reduced to $680,000—to the loss of every other creditor of the company.

In *Trustees v. Greenough,* 15 Otto 527; 26 L. Ed. 1157, the Supreme Court of the United States, through Mr. Justice Bradley, said:

> "As to the point made by the appellants, that the complainant is only a creditor seeking satisfaction of his debt, and cannot be regarded in the light of a trustee, and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs, as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust,* and to have secured its proper

application to their use. There is no doubt from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."

Central R. R. etc. v. Pettus, 113 U. S. 116, 28 L. Ed. 915;

Missouri & K. I. Ry. v. Edison, 224 Fed. 79, 82.

In the case of *Burden Central Sugar Refining Co. v. Ferris Sugar Mfg. Co.,* 87 Fed. 810, the court in holding that the solicitors for a creditor who had commenced suit against an insolvent corporation, in its behalf, and in behalf of all other creditors who might intervene and contribute to the expense, and procure the appointment of a receiver and in holding that such solicitors were entitled to compensation out of the general fund for the services rendered after, as well as those rendered before, the appointment of the receiver—said at pages 811, 812:

> "One jointly interested with others in a common fund, who in good faith maintains the necessary litigation to save it from waste, and secures its proper application, is entitled in equity to the reimbursement of his costs, as between the solicitor and the client, either out of the fund itself, or by proportionate contributions from those who receive the benefits of the litigation." (Citing authorities.)

The following excerpt is peculiarly applicable to this case, quoted from *Robinson v. Mutual Reserve Life Ins. Co.,* 182 Fed. 850, at page 864:

> "The allowances made by the special master to the receivers and to the complainants' counsel seem at first sight large in comparison to the amount of the fund; but for nearly three years the receivership has moved smoothly and successfully over many rough places. It bristled with legal and business complications which were surmounted only by the patience and intelligence of all concerned, conspicuously of the receivers and of the counsel for complainants. I think the amount of the allowances fully justified. There is an exception to any allowance to the counsel of complainants for services after the appointment of receivers. It is said that the claim of the complainants after that time was hostile to the claims of other creditors, and therefore that they ceased to represent all concerned. This is true so far as questions of priority are concerned, but not as to the general conduct of the cause. Mr. Winslow's services of this character were so helpful that I would strain a point, if necessary, to sustain the allowance; but authority is found for it in Burden Co. v. Ferris Co., 87 Fed. 810."

In this case, as in the *Robinson* case, the receivership has moved over many rough places and has bristled with legal and business complications. In that case an allowance was made to the counsel of the *complainant* for services after the appointment of the receiver, which means that counsel for the First National Bank would be entitled to an allowance if the efforts of such counsel had protected the property in the hands of the receiver from waste or destruction, or had brought an additional fund into the estate of the receiver.

Shainwald, Assignee, v. Lewis, 8 Fed. 878.

In *Lamar v. Hall and Wimberly,* 129 Fed. 79, it is said, pages 82, 83:

> "Executors, administrators, guardians, *receivers,* and other trustees being the agents and legal representatives of the beneficiary or beneficiaries of the trust, are allowed credit for necessary and reasonable charges, including attorney's fees, incurred by them in the *protection* and administration of the trust fund. The same principle is extended to other cases. One jointly interested with others in trust property, who in good faith maintains for himself and others interested like him, the necessary litigation to save it from waste and to secure its proper application, is entitled to the reimbursement of his costs, as between solicitor and client, out of the fund to be administered."
>
> *Trustees v. Greenough,* 113 U. S. 116; 28 L. Ed. 915.

In 2 *Foster's Fed. Practice,* Sec. 421, it is said:

> "Costs are paid out of a fund or estate in the course of distribution by a court of equity,

> to trustees who have been obliged to engage in litigation for the benefit of the estate and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated. * * *
>
> "Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them. * * *
>
> "Costs have been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to collect his own claim against it."

Section 796 of the *Code of Civil Procedure* of the State of California relating to partition suits, declares the general equity rule in cases where moneys have been expended or services rendered for the common benefit. That section provides:

> "The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees and other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein."

IV.

APPELLANTS' AUTHORITIES ON PAGES 14 TO 18 OF THEIR BRIEF ARE INAPPLICABLE TO THE FACTS OF THIS CASE.

It may be admitted that if contests had arisen or shall arise between claimants in respect to priorities or the right to share in the distribution of the funds in the hands of the receiver, such contests

would be individual in character as involving antagonistic interests, and it is such cases that the appellants rely upon.

Here neither Mr. Dorsey nor Mr. Cashman was, nor had either of them ever been, the attorney for the plaintiff; they had no interest in the receivership proceedings or in any of the parties or persons interested therein at the time of their employment, other than to protect and preserve the insolvent estate. The court and the receiver were vitally interested in keeping the properties covered by the trust deed in the possession of the receiver and under the control of the court for equitable distribution among all the creditors in accordance with their respective claims and priorities. The cattle company was, as it is and always has been, anxious to have its creditors paid to the last farthing in value the property will bring.

The interests of the receiver and of the cattle company were identical, and there was not the remotest probability that they will ever be conflicting.

Messrs. Dorsey and Cashman were familiar with all that had been done in the receivership since the appointment of the receiver on July 28, 1920.

The cases and text books the appellants cite and rely upon do not support their contention. For example: *High on Receivers,* (4 Ed.) p. 188, at page 217, quoted from by counsel, says:

> "It has been held reversible error to make an allowance of counsel fees to a receiver's

> attorney who also represented the plaintiff in the action."

That is not the case here.

In *Vieth v. Ress,* 82 N. W. 116, cited in appellants' brief, pp. 15 and 16, the court held:

> "The interests of the debtor and creditor are conflicting and the same attorney cannot with propriety act for the receiver who represents both. * * * We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers (Alderson's Ed., 1897). At page 274 the learned author says: 'The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver operate, also, to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his client, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as cannot be properly performed by one person.'"

In this matter, it was the desire of the company to protect and preserve the properties sought to be taken over by the trustees or sold at *forthwith* sale, and the interest of the cattle company was in harmony the duty of the court and of the receiver.

Counsel for appellants quote fully from *Adams v. Woods,* 8 Cal. 306, on page 17 of their brief, but miss the point involved here. In that case there was a flagrant attempt to evade the salutary rule

that one cannot in a court of equity ask for compensation from a fund in *custodia legis* when representing conflicting interests in that fund.

Stanley, the petitioner for a fee, was in the employment of the plaintiff, Alvin Adams, and acting as his counsel; Naglee was the receiver. The court says, page 319:

> "Adams and the receiver clearly occupied very different positions with respect to the fund (in the hands of the receiver) and the claims upon it. When, therefore, Shafter & Park subjected themselves to the receiver's counsel, they placed themselves in a false position. It was the duty of Naglee to do entire justice to all parties. He had no interest in defeating just claims, or in allowing those that were unjust. His position was that of perfect impartiality. But it was not so with Adams. It was his pecuniary interest to defeat all the claims. Besides that, it was his interest to make the receiver liable, if he could. Suppose that Adams should wish to call in question the acts of the receiver, in those very cases where Shafter & Park advised and acted as his counsel. It would certainly place the counsel in a most embarrassing position."

There is not the slightest similarity between that case and this. By no possibility could Messrs. Dorsey and Cashman be placed in a false position, or be suspected of attempting to serve two masters, or be required to occupy inconsistent positions. Here the claims of all creditors had been ascertained, regularly presented, allowed by the receiver and by

the court, and the allowance consented to and approved by the cattle company.

The cattle company's and the receiver's employment were precisely for the same purpose—to resist the claim and contention of the First Federal Trust Company and of the appellant banks that a default in the trust deed had been committed, or that the estate in the hands of the receiver should be sold at auction sales.

Certainly, it cannot be made to appear that actual injury or unfairness has resulted to a party to the action or to the receivership fund. Judge Rudkin said that the claim of the First Federal Trust Company, and, therefore, the demands of the banks which supported it in the attempt to take the mortgaged properties from the lower court and its receiver, were disruptive, inequitable and unjust to the creditors of the cattle company, and it cannot be said that any injury has resulted to the fund in the hands of the receiver.

As said in Section 631 of *Tardy's Smith on Receivers,* the very section relied upon by counsel for appellants:

> "The reason for the rule [which has no application here] is the possibility that there may arise situations in the course of administration in which there would be a conflict of interest between the party whose attorney is selected and other parties to the action, a situation in which the receiver is supposed to be impartial. The character of the duties to be mainly performed by the attorney [as here] may remove

> the necessity for following the rule. * * * In case a conflict of interest arises or appears probable, it is within the power of the court to compel a change of attorneys.
>
> "Oftentimes the receivership proceeding is the consummation of vigorous efforts on the part of plaintiff's attorney to force into the open an unwilling debtor, as, for instance, where one has concealed or fraudulently transferred his assets [a situation not more persuasive than the one causing the employment of Messrs. Dorsey and Cashman].
>
> "In such case the rule is 'more honored in its breach than it would be in its observance', and wisdom dictates that the receiver should have the benefit of the knowledge gathered by the attorney prior to the appointment of the receiver."

In the note to the section from which we have quoted, it is said:

> "A receiver may, without impropriety, be represented by the attorney of a party where the interests of the receiver and such party are not adverse." (Citing cases.)

In *C. J. Turner Lumber Co. v. Toomer*, 275 Fed. 678, the court says, pages 679, 680:

> "The record does not disclose any conflict of interest between parties to this cause which would present a legal reason why a judge should refuse to permit attorneys for a party to act as attorneys for the receiver. Conceding the rule that generally such dual representation should not be allowed without permission of the court, there is no rule that under no circumstances should an attorney for a party act as attorney for the receiver. In some cases an attorney for one of the parties can give the

most efficient service to a receiver without any conflict of duty. Shainwald v. Lewis (D. C.), 8 Fed. 878.

"This record does not show but that the employment of these attorneys by the receiver was actually known by the court. Where the court could have authorized this employment, he could approve such employment, made under a general authority, and the order of the court awarding compensation is such an approval. Stuart v. Boulware, 133 U. S. 78, 81, 10 Sup. Ct. 242, 33 L. Ed. 568.

"The record does not show but that the court was fully advised as to the services rendered by receiver's counsel and of their value. The introduction of evidence was not essential to a decree fixing such compensation. 34 Cyc. 466."

In *In re Smith,* 203 Fed. 369, the court, relying upon Beach on Receivers, High on Receivers, Alderson on Receivers and Loveland on Bankruptcy, says, page 372:

"The general rule is that a receiver may not employ the solicitor of either of the parties to the suit in which he is appointed (Beach on Receivers, Sec. 262); and this rule applies to trustees. But it is only when the receiver is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. Beach on Receivers, Sec. 263; High on Receivers, Sec. 217; Alderson on Receivers, Sec. 233. The general rule doubtless is that a trustee or a receiver should not ordinarily employ the attorney who represents the bankrupt, or an attorney who represents interests in the litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee (Loveland on Bankruptcy, 4 Ed. p. 257); and where there are matters in controversy between different classes

> of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. In re Rusch (D. C.), 105 Fed. 607."

Nor does *McPherson v. United States*, 245 Fed. 35, support the contention of the appellants' counsel. On page 41 the court says:

> "The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest (In re Smith, 203 Fed. 369; Alderson on Receivers, Sec. 233) and has no application to proceedings such as taken here, to recover property fraudulently conveyed."

Nor to prevent property from being seized and wasted.

The rule relied upon by counsel as stated on page 291 of 34 *Cyc.* is subject to the qualifications we have referred to in other cases.

In Note 49, 34 *Cyc.*, page 292, it is said that

> "It was only when the receiver was acting adversely that it had ever been supposed that there was any impropriety in employing the counsel of a party, and it was indicated that if any general practice ever existed which prohibited the appearance by the solicitor of one of the parties for the receiver, it had been disregarded almost daily for many years."

In *Adler v. Seaman*, 266 Fed. 828, another of the cases relied upon by counsel for appellants, the court says on page 843:

> "The attorney for a receiver is an officer of the court, chosen by the court, and must exer-

> cise the duties of his position impartially, with an eye single for the proper and successful conduct of the receivership. * * * The trial court, which must conduct this receivership, is presumed to have been familiar with his qualifications and impressed with the conviction that his services would be impartial and efficient."

Ryckman v. Parkins, 5 Paige Ch. 543 (3 N. Y. Ch. Rep. 822) is an equally unfortunate citation.

On page 545, 5 Paige Ch. (3 N. Y. Ch. Rep. 824), the court says:

> "As between party and party, the counsel for the complainant has in no case a right to be paid for the counsel services out of a fund belonging to a defendant, *except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties.*"

Here, counsel were employed to retain and to prevent the loss of almost the entire fund in the possession of the receiver for the benefit of all creditors.

V.

REPLYING TO THE STATEMENT THAT MESSRS. DORSEY AND CASHMAN AT THE HEARING WITHDREW ALL CLAIM FOR SERVICES RENDERED TO THE RECEIVER UNDER THE ORDERS OF THE COURT (PP. 18-21, APPELLANTS' BRIEF).

It may be said that the statement made by Mr. Dorsey, in response to questions propounded by counsel for appellants, set out on pages 18 and 19 of appellants' brief, correctly portrays Mr. Dor-

sey's state of mind. But he spoke for himself alone. Mr. Cashman was an independent attorney for the receiver, and, though present in court, did not concur in Mr. Dorsey's statement relating to his claim against the receiver.

Mr. Dorsey's position was that he had acted in his employments in the interest of all the creditors to prevent the disruption and loss of the fund in the receiver's possession, and that what he had done might be regarded as having been done in his employment by the company, whatever benefit may have resulted to the receiver; and that the value of his services could not be apportioned between the cattle company and the receivership.

But in the last analysis the service was to prevent the withdrawal of almost the entire fund of the receivership.

Whatever Mr. Dorsey's attitude in the premises, the court concluded, probably, that inasmuch as the cattle company was penniless and the employment was by its order and the services rendered were for the benefit of the creditors by preventing depletion of the fund possessed by the receiver, payment should be made directly from that fund. Judge Farrington said:

> "I said plainly * * * the order would be made allowing compensation, because Mr. Dorsey had rendered exceedingly valuable services to this estate, and had rendered them at the request of the court, and on the order of the court, and at the request of the receiver. Mr.

> Belford [one of the original and now attorneys for the receiver] coincided with that view."

It may be added that there was no change of position by appellants because of anything said by Mr. Dorsey, and therefore, no estoppel can be asserted.

VI.

THE RECEIVER WAS FULLY AUTHORIZED, JUSTIFIED, PROTECTED AND DIRECTED IN MAKING THE EMPLOYMENT.

In the order of his employment made July 28, 1920, he was authorized and empowered

> "To employ such * * * assistants and *attorneys* as he may deem necessary or proper."

The order of the court, filed March 17, 1924, is that

> "The receiver herein is authorized to employ such additional legal assistance as he may deem necessary, connected with the three appeal cases", etc. (Tr. p. 61.)

Messrs. Dorsey and Cashman were directly employed by the court to perform the services for which they asked compensation, by the order of the court filed March 26, 1924:

> "J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals for the Ninth Circuit, with full authority to represent the receiver therein", etc. (Tr. pp. 62, 64.)

It is respectfully submitted that if Messrs. Dorsey and Cashman had not been employed by the receiver nor appointed by the court, but as mere volunteers had performed the services they in fact did render, and thus had aided in frustrating the attempt of these appellants to force instant liquidation at forced sale,—they would have been entitled to reimbursement and payment from the fund in the receiver's hands.

40 *Cyc.* 2808;

Civil Code, Sec. 3521.

VII.

THE APPEAL SHOULD BE DISMISSED.

(a) As to J. W. Dorsey and W. E. Cashman against whom no relief is sought and who are improperly made appellees—if in fact it is intended to make them appellees by the part of the title of the appeal reading "and *to* J. W. Dorsey and W. E. Cashman";

(b) As to W. T. Smith, because it appears that the appointment of J. W. Dorsey and W. E. Cashman, as attorneys for the receiver, was made directly by the court;

(c) As to Union Land & Cattle Company because that company, as such, was not a party to the proceeding made the subject matter of the appeal;

(d) As to all of the appellees, because the appointment of and payment to J. W. Dorsey and W. E. Cashman was within the jurisdiction of the court, and no abuse of discretion in the exercise of that jurisdiction is assigned or shown; and because the appellant banks through their counsel, both in the appeals in the Circuit Court of Appeals and in all subsequent proceedings before the lower court, participated therein, knew of the appointment of J. W. Dorsey and W. E. Cashman and that they were acting attorneys for the receiver, did not object, but, therefore, consented thereto, and are now estopped.

It is submitted:

First, That the appeal should be dismissed; or

Second, That the order appealed from should be affirmed.

Dated, San Francisco,
February 13, 1925.

J. W. Dorsey,
W. E. Cashman,
In Propriis Personis and as Attorneys for Appellees.
S. W. Belford,
Geo. S. Brown,
Attorneys for All Appellees.